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LAW REFORM

Gone missing

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consider ways of improving the law's response to missing persons in Queensland

The prevalence of missing persons in Australia is stark. The Australian Federal Police estimate that 35 000 people are reported missing annually, 1600 of whom disappear for more than six months.¹ This is a significant period of time during which the need to manage aspects of the missing person's estate are likely to arise.

The statistical significance of missing persons however has not prevented it from remaining a hidden issue. This is even the case among community legal centres ('CLCs'), despite them often being the 'go to' agencies for those seeking legal assistance. At the time of writing only three CLCs in Australia² provided dedicated online information about missing persons.³ There is also no specific data collection category to identify legal issues associated with a person who has gone missing.⁴

This Brief seeks to critique the shortcomings of Queensland laws relating to missing persons. It compares the Queensland position with other jurisdictions and makes recommendations for reform.

The law in Queensland

Where a missing person is concerned, the law makes the prima facie presumption that the person is alive. This causes complications because if a person is not legally deceased, then their estate cannot be managed by anyone but that person. In Queensland there are two broad ways in which to rebut the prima facie presumption that that person is alive so that the Court can issue a presumption of death.⁵ The first is to obtain a declaration of death, which the court will issue only after the person has been missing for seven years,⁶ and the second is by leave to swear death, which may be sought prior to the end of that seven year period.⁷ If a presumption of death is granted, a death certificate will be issued⁸ thus allowing family members to access the estate through the usual succession law channels.

Declaration of death

A person with a legal interest in the missing person's estate can apply to the Supreme Court of Queensland for a declaration of death.⁹ Through this process, the interested party can present evidence to support their belief that the person is dead so as to convert that belief into a fact.¹⁰ Pursuant to the decision in *Axon v Axon*, seven years is the current common law standard after which courts will be likely to declare death.¹¹ However, this time period alone is insufficient proof. The personality of the missing person¹² and any circumstances of danger surrounding their disappearance are evidence supporting a finding of death.¹³ Only if the evidence satisfies the Court will a death certificate be issued.

Leave to swear death

If there are pressing issues concerning a missing person's estate which need to be addressed before the seven year mark, an application for 'leave to swear death' may be lodged with the Supreme Court of Queensland. To obtain a death certificate in this way an applicant must demonstrate that, on the balance of probabilities, the missing person has indeed died.¹⁴

Queensland courts however have been reluctant to make such a finding where the evidence is not overwhelmingly compelling.¹⁵ For example, although leave to swear death has been granted for fishing accidents where the person was seen washed out to sea, or where an accident at sea is known to have occurred,¹⁶ less extreme circumstances usually fail to amount to an inference of death.¹⁷ What this means is that in situations where the cause of disappearance is not self-evident, families are unable to obtain a death certificate by way of leave to swear death.

Alternatives to obtaining a 'presumption of death'

Where death cannot be presumed, there is no specific legislative provision for the management of a missing person's affairs in Queensland. Those seeking to deal with an estate may make an application to the Queensland Civil and Administrative Tribunal ('QCAT') for the appointment of an administrator.¹⁸

QCAT appoints an administrator only where it can be shown that there is a specific need for such an appointment. The powers bestowed upon an administrator allow the administrator to do anything that the subject person could have done for themselves but for their lack of capacity.¹⁹ These powers are typically designed for adults with disability who are incapable of proper decision-making,²⁰ however they require that the person subject to an administration order be informed of the application for appointment.²¹ The administration power is thus an unsuitable option to deal with a missing person's estate for self-evident reasons.

In the alternative, a missing person's estate can be administered by the Public Trustee as 'unclaimed property'²² however the

results are similarly unsatisfactory. Of note, the Public Trustee has the discretion to administer unclaimed property but is ultimately not obliged to do so.²³ Even where the Public Trustee does undertake administration of the unclaimed property, this avenue fails to allow the missing person's family to be involved in the management of that missing property.

Since neither avenue caters specifically to situations involving missing persons, their use and practicality in this context are limited. We therefore argue that the Queensland approach at present fails to cater for missing persons. Research demonstrates that one of the practical implications of such a system is the inability for family and friends to obtain 'closure' over a person's disappearance, including through the handling of their estate.²⁴ This can complicate the grieving process and prolong feelings of loss.²⁵ In contrast to Queensland, other Australian jurisdictions offer a more nuanced legislative approach.

A preferred approach: Victoria, NSW and the ACT

Unlike other jurisdictions, Queensland does not have specific legislation allowing for the management of a missing person's estate prior to seeking a presumption of death.

Following an Inquiry into the *Guardianship and Administration Act 1986* (Vic) in August 2010,²⁶ the Act was amended to allow families and friends of a missing person to apply to the Victorian Civil Administrative Tribunal ('VCAT') for an order appointing an administrator to deal with the missing person's financial affairs.²⁷ The Victorian legislation was modelled on the *Trustee and Guardianship Act 2009* (NSW) and *Guardianship and Management of Property Act 1991* (ACT). Aside from minor procedural differences, these three jurisdictions are substantively similar. The amendments were enacted in response to parliamentary debates that considered the common law's inadequacy with respect to missing persons.²⁸ These statutes allow a person to deal with the missing person's estate if:²⁹

they have been missing for 90 days and reasonable efforts have been made to find them;
there is a need for a decision to be made regarding their finances;
it is in their best interest that an administrator be appointed.

The Acts allow orders to be made regarding administration and management of the estate, including payment of debts, maintenance of dependents, and any other orders the relevant body sees fit.³⁰

Debate over the 2010 Victorian Bill raised concerns about the impact that the proposed amendments may have on a person's property and privacy rights under the *Guardianship and Administration Act 1986* (Vic).³¹ However, any interference with a missing person's privacy was found to be neither arbitrary nor unlawful as administrators have restricted powers and are monitored by VCAT.³² Since decisions about property must be made in the 'best interests' of the missing person, the new laws were found unlikely to have the effect of depriving a person of their property rights.³³ Powers conferred by VCAT are nonetheless broad and can even be used to alleviate debts. By granting extensive powers under their respective Acts, NSW, Victoria and the ACT provide for cost-effective and efficient management of a missing person's estate.

Unlike the ACT, Victoria and NSW, the *Guardianship and Administration Act 2000* (Qld) fails to provide for management of a missing person's estate. To address this gap it is suggested that, similar to the other jurisdictions, Queensland include provisions for administration of a missing person's estate in the *Guardianship and Administration Act 2000* (Qld).

Further abroad: UK legislates for presumption of death

Consideration may also be given to the way in which England and Wales have dealt with presumptions of death.³⁴ The *Presumption of Death Act 2013* (UK) came into force on 1 October 2014, following a three-year long 'Missing Rights' campaign.³⁵ The *Presumption of Death Act 2013* provides that a presumption of death can be obtained from the High Court³⁶ where a person has not been known to be alive for at least seven years.³⁷

Though less flexible than the ACT, Victorian and NSW legislative approach, the *Presumption of Death Act 2013* (UK) creates greater certainty by expressly legislating for the common law standard of seven years.³⁸ In making a declaration of presumed death, the High Court may also state when the missing person was deemed to have died³⁹ thereby pinpointing the time of death, which may be relevant to other matters such as determination of property interests. The Act also allows for revocation or variation of the declaration, thereby assuming that the missing person might reappear.⁴⁰ The position in England and Wales therefore clarifies an otherwise largely discretionary legal issue.

Conclusion

When a person goes missing, those they leave behind are faced with a myriad of emotional and financial difficulties. The current Queensland law is difficult to navigate and the options available to families of the missing person are severely limited. Incorporating the administration of missing persons' estates into the *Guardianship and Administration Act 2000* (Qld) would provide an effective process for managing the issue. Furthermore, the inclusion of provisions similar to the *Presumption of Death Act 2013* (UK) in the *Guardianship and Administration Act 2000* (Qld), would clarify the common law standard in *Axon* regarding obtaining a presumption of death. These reforms would go a long way towards providing the changes needed to help deal with a missing person's estate.

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2. Central Coast CLC, *Legal Advice and Services*; Loddon Campaspe Community Legal Centre, *Safe Keeping: A Guide to Managing the Affairs of Missing Persons* (2010)

<<http://lclcl.org.au/programs/publications/>>; Caxton Legal Centre, *Missing Persons* (2014) <https://caxton.org.au/self_help_kits.html>.

3. These figures are based on information publicly available on CLC websites relating to missing persons.

4. Community Legal Service Information System ('CLSIS'), the national data collection software program utilised by CLCs, does not contain a specific category to record legal advice related to missing persons.

5. *Chard v Chard* (1956) 259, 272.

6. *Axon v Axon* (1937) 59 CLR 395.

7. *Re Bennett* [2006] QSC 250.

8. If the Court grants a presumption of death, that person's relatives may then apply to the Registry of Births, Deaths and Marriages for a death certificate. Obtaining a presumption of death in Queensland is the equivalent of a person having died in that state therefore their death must be registered and a death certificate issued, *Births Deaths and Marriages Registration Act 2003* (Qld), s 26.

9. Such evidence may be direct, circumstantial or inferred, *Re Parker* [1995] 2 Qd R 617.

10. *Re Parker* [1995] 2 Qd R 617, 621.

11. *Axon v Axon* (1937) 59 CLR 395.

12. *Chard v Chard* [1956] 259, 272.

13. *Axon v Axon* (1937) 59 CLR 395, 404–5.

14. *Re Bennett* [2006] QSC 250.

15. *Re Parker* [1995] 2 Qd R 617

16. *Re Parker* [1995] 2 Qd R 617; *Re Bennett* [2006] QSC 250.

17. *Axon v Axon* (1937) 59 CLR 395.

18. *Guardianship and Administration Act 2000* (Qld), s 12.

19. *Ibid*, s 33.

20. *Ibid*, s 6.

21. QCAT, *Guardianship for Adults, Application Process* (2014) <<http://www.qcat.qld.gov.au/matter-types/guardianship-for-adults-matters/application-process>>.

22. *Public Trustee Act 1978* (Qld), s 103.

23. *Ibid* s 104(4).

24. Malcom Payne, 'Understanding "Going Missing"' (1995) 25 *British Journal of Social Work*, 333, 343–5.

25. *Ibid*.

26. VLRC's Review of the Guardianship and Administration Act 1986 (Vic).

27. *Guardianship and Administration Act 1986* (Vic), part 5A.

28. Victoria, *Parliamentary Debates*, Legislative Assembly, 12 August 2010.

29. *Guardianship and Administration Act 1986* (Vic), s 60AB(2); *Guardianship and Management of Property Act 1991* (ACT), s 8AA(1); *Trustee and Guardian Act 2009* (NSW), s 54(2).

30. Those relevant bodies being VCAT, ACAT or the NSW Supreme Court.

31. Victoria, *Parliamentary Debates*, Legislative Assembly, 12 August 2010.

32. *Ibid*.

33. *Guardianship and Administration Act 1986* (Vic), s 60AI(1)(d)(1A).

34. *Presumption of Death Act 2013* (UK) s 23.

35. Campaign was run by the organisation Missing People. See <www.missingpeople.org.uk>.

36. *Presumption of Death Act 2013* (UK) s 20(1).

37. *Ibid* s 1(1)(a).

38. The UK cites cases establishing this common law period in *Re Phene's Trust* (1870) LR 5 Ch. 139; *Laws of England* (2nd ed.), Vol XIII, pp 630–1; for Australia see *Axon v Axon* (1937) 59 CLR 395, 404–5.

39. *Presumption of Death Act 2013* (UK) s 2.

40. *Ibid* s 5.